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DISSEMINATION BRANCH

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THE CAPITAL GROUP COMPANIES, INC.

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DISSEMINATION BRANCH  
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CATHERINE L. HERON  
Assistant General Counsel

April 28, 2000

Manager  
Dissemination Branch  
Records Management and Information Policy  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
Attention: 1550-0223

Re: Proposed Agency Information Collection Activities

Dear Sir or Madam:

I am writing on behalf of Capital Bank and Trust Company ("CB&T"), a federal savings bank in organizational status, to provide comments on the proposed regulations issued in the Federal Register on March 1, 2000 (Vol. 65, No. 41). Among other things, these regulations prescribe the requirements for the quarterly filing of the Federal Financial Institutions Examination Council's (FFIEC's) Annual Report of Trust Assets.

The proposal would modify Schedule SI (Supplemental Information) of the Thrift Financial Report (TFR) to collect the volume and amount of fiduciary accounts and nonfiduciary accounts. The information collected on these reports is used to determine the amount of the semi-annual assessment on trust assets pursuant to the provisions of 12 CFR 502, as recently revised under Thrift Bulletin 48-16.

These comments relate to the categories prescribed for reporting trust assets and the application of these categories to federal savings banks that hold substantial non-discretionary trust assets.

#### Summary of CB&T Comments

The proposed regulations require that reporting institutions divide their total trust assets into three categories: 1) fiduciary accounts for which the bank has discretion, 2) fiduciary accounts for which the bank has no discretion, and 3) nonfiduciary accounts for which the bank has administrative responsibilities. No definition of a "fiduciary account" or a "nonfiduciary account" is provided, and there are no instructions on how various trust activities are to be categorized as fiduciary or nonfiduciary. We urge a clarification of the regulations that would

permit an institution to report all of its non-discretionary trust assets in the category of nonfiduciary accounts for which the bank provides administrative services.

As the duties of a non-discretionary trustee are, in our view, essentially identical to those of an institution providing solely administrative services, we believe only two reporting categories are necessary: fiduciary accounts for which the bank has discretion and nonfiduciary accounts for which the bank has administrative responsibilities. We therefore urge the OTS to eliminate category two, fiduciary accounts for which the bank has no discretion. In the alternative, we believe that federal savings banks should be permitted to report all of their non-discretionary trust assets in category three, nonfiduciary accounts for which the bank has administrative responsibilities.

#### Eliminate The Fiduciary Account No Discretion Category

We believe that the second reporting category, fiduciary accounts for which the bank has no discretion, should be eliminated, because the apparent scope of the category is itself internally inconsistent and redundant with the third category. An account for which a federal savings bank has no discretion is, by its very nature, a nonfiduciary rather than a fiduciary account. Because function rather than mere title should govern the determination of fiduciary status, accounts with respect to which the bank has no discretion should be reported in the third category for nonfiduciary assets.

The conclusion that a non-discretionary trust account should be treated as a nonfiduciary account is supported by existing banking regulations. Although the OTS regulations at 12 CFR Part 550 do not distinguish between a discretionary and non-discretionary trustee, these regulations do distinguish between certain types of trustees. In Subpart E, the regulations state that a bank trustee of a retirement plan or IRA or a trustee of a fiduciary account that involves no active fiduciary duties may act in a fiduciary capacity without obtaining OTS approval. Existing OTS regulations, therefore, appear to recognize that a trustee can act in a non-fiduciary capacity and that less oversight is needed in such cases.

The regulations of the Office of the Comptroller of the Currency (OCC) provide greater detail on the banking law concept of "fiduciary capacity." For example, in the preamble to the regulations at 12 CFR section 9.2(e) (61 FR 68543, Dec. 30, 1996), the OCC uses investment discretion as a test of fiduciary capacity: "[T]hus the proposal defined fiduciary capacity to exclude relationships (other than those listed in the statute) in which the bank does not have investment discretion." The preamble goes on to state that neither non-discretionary investment advisory activities nor non-discretionary custodial activities are treated as fiduciary activities under the OCC regulations.

Defining the scope of fiduciary activities in terms of function rather than mere title is also consistent with both the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and recent case law addressing the status of non-discretionary trustees under ERISA. Section 3(21) of ERISA defines a fiduciary as someone who exercises

discretionary authority or control with respect to the investment or the administration of a plan or someone who renders investment advice for a fee. A number of federal courts interpreting this ERISA definition have specifically held that non-discretionary trustees are not fiduciaries. For example, in Donovan v. Cunningham, 541 F. Supp. 276 (1982, S.D. Tex.), *aff'd* in part and *rev'd* in part, 716 F. 2d 1455 (1983), *cert. denied* 467 U.S. 1251 (1984) the court held that a bank, although the plan trustee, was not a fiduciary within the meaning of ERISA. In that case, the bank was contractually obligated under the trust instrument to follow the directions of a plan fiduciary. The court found from the evidence presented that the bank at all times remained within the limited role of directed trustee and was, therefore, not a fiduciary within the meaning of ERISA. Similarly, in Robbins v. First American Bank, 514 F. Supp. 1183 (1981, N.D. Ill.) the court observed that when a bank is a directed trustee following instructions of a plan fiduciary, or is a custodian of plan assets, it was not a fiduciary. In Beddall v. State Street Bank and Trust Company 137 F.3d 12 (1<sup>st</sup> Cir., 1998) the court held that the bank, which held plan assets "in trust" but did not manage, administer or conduct valuations of the assets, was not a fiduciary.<sup>1</sup>

In light of this legal authority, we urge the OTS to adopt a definition of a "fiduciary account" that excludes non-discretionary trust accounts with respect to which the bank serves only as a directed non-discretionary trustee. Under this approach, trust assets would be categorized as either fiduciary or non-fiduciary accounts for purposes of Schedule SI of the quarterly TFR reports. The category proposed to report fiduciary assets for which the bank has no discretion would be eliminated. Accordingly, only accounts for which the bank exercises discretionary investment or administrative responsibility or provides investment advice for a fee<sup>2</sup> would be reported as fiduciary accounts. Accounts with respect to which the bank has no discretion and for which the bank does not provide investment advice for a fee would be reported as nonfiduciary accounts.

#### Report Non-discretionary Trust Assets as Nonfiduciary Accounts

In the alternative to eliminating the second category (fiduciary accounts for which the bank has no discretion), we believe that the regulation should permit the inclusion of non-discretionary retirement plan assets in the third category, nonfiduciary accounts for which the bank has only administrative responsibilities. This category most accurately reflects the functions performed by a bank acting in a directed, non-discretionary capacity--these functions are essentially administrative in nature.

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<sup>1</sup>See also Richardson v. U.S. News & World Report 623 F. Supp. 350 (D.D.C. 1985) O'Toole v. Arlington Trust Company, 681 F. 2d 94 (1<sup>st</sup> Cir. 1982) and Hibernia Bank v. Int'l Brotherhood of Teamsters, et. al. 411 F. Supp. 478 (N.D. Cal. 1976).

<sup>2</sup>The OCC regulations at 12 CFR Part 9 provide that rendering investment advice for a fee also falls within the definition of "fiduciary capacity". This approach is consistent with ERISA, which includes someone who renders investment advice for a fee within the definition of a "fiduciary."

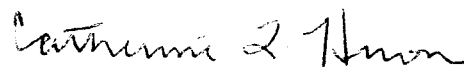
We further note that, a non-discretionary trustee holding substantial IRA accounts could serve those accounts as either a "custodian" or a "trustee." By simply using a custodial agreement rather than a trust agreement or by amending its trust agreement to a custodial form, the role of a bank holding substantial IRA accounts could be changed from that of a "trustee" to a "custodian" with respect to its IRA accounts. Such an amendment would represent a mere change in form that would have no substantive effect on the rights or obligations of either the bank or the IRA participants. As a result of such a change, however, all of the bank's IRA accounts<sup>3</sup>, would be held as non-trust accounts for which the bank provides custodial and other administrative services. There seems little question that these assets could be reported in category three, nonfiduciary accounts for which the bank provides administrative services.

Although a change in title from "trustee" to "custodian" could be accomplished with relatively little difficulty, we urge the OTS to permit banks to use either the trust or custodial form for their IRA accounts. OTS reporting regulations should not create an incentive to convert IRA trust arrangements to custodial arrangements. Instead, the OTS should permit a bank with non-discretionary trust assets, including IRA trust assets, to report all of these non-discretionary trust accounts in the third category (nonfiduciary with administrative responsibilities). Requiring banks to amend their existing IRA trust agreements so that these accounts could be reported as nonfiduciary assets would only serve to elevate form over substance.

#### Conclusion

We commend the OTS for proposing new reporting rules for federal savings banks that would distinguish for the first time between different types of trust assets. It is appropriate that the regulatory regime applicable to such assets distinguish between those trust assets that require greater oversight and those that require less. In drawing this distinction, however, we urge the OTS to focus on the functions performed by the bank rather than the title under which an account is held. A distinction drawn on a functional basis should result in the elimination of the category proposed for fiduciary non-discretionary accounts, because the functions of a bank with respect to such an account are essentially non-fiduciary and administrative in nature. The assets of non-discretionary trust accounts should be reported as nonfiduciary accounts for which the bank has administrative responsibilities.

Sincerely,



Catherine L. Heron

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<sup>3</sup> In addition, the section 403(b) accounts held by a bank typically would be held in custodial form.